UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
KIMBERLY-CLARK CORPORATION,	)	Docket No. RCRA-88-04-R
	)	
Respondent	)	

ORDER

On December 29, 1987, the United States Environmental Protection Agency, Region IV (sometimes EPA or complainant) issued a complaint and compliance order (complaint) pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C § 6928, against Kimberly-Clark Corporation (respondent). The latter was charged generally with creating and operating a landfill as a disposal facility without properly notifying EPA pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, and failing to follow 40 C.F.R. Part 264 during the three years that disposal took place in the landfill.

On February 2, 1988, complainant issued an amended complaint which was substituted for and superseded any previously issued complaint in this proceeding. The amended complaint was issued, as was the original complaint, pursuant to Section 3008(a) of RCRA. However, it also contains corresponding citiations to

Alabama state regulations in that the State was granted, on December 22, 1987, final authorization to carry out its hazardous waste program in lieu of the federal program.

Respondent served its answer and a motion to dismiss, with supporting brief (motion) on February 22, 1988. Complainant filed a "reply" to the motion on March 14, 1988.* Respondent then submitted a reply to this submission on March 23, 1988.

In an order of designation of March 21, 1988, the parties were advised that the undersigned Administrative Law Judge (ALJ) has been designated to conduct this proceeding. Correspondence with, or service upon, the ALJ shall be directed to:

Frank W. Vanderheyden
Administrative Law Judge
Environmental Protection Agency
401 M Street, S.W.
Mail Code A-110
Washington, D.C. 20640

The respective arguments of the parties are well-known and they will not be repeated here except to the extent deemed necessary by this order. The motion argues that once a state has received final authorization to administer its hazardous waste program under Section 3006 RCRA, 42 U.S.C § 6926, EPA is without power to commence an independent enforcement action.

---

*Complainant's attention is invited to 40 C.F.R. § 22.16(b) which provides that an acknowledgement to a motion is a "response," not a "reply."

To support this, respondent cites Northside Sanitary Landfill v. Thomas, 804 F.2d 371 (7th Cir. 1986), hereinafter Northside. Respondent also argues that ALJ Yost echoed this thought in an initial decision captioned, In re CID-Chemical Waste Management of Illinois, Inc., No. V-W-86-R-77 (April 2, 1987), hereinafter CID. In pertinent part, that decision held that EPA is without authority to bring an independent federal action based solely on alleged violations of state law. While the ALJ's conclusion is entitled to deference, CID is not precedent as it is an initial decision currently on appeal and EPA has yet to provide its final thoughts concerning the issue in contention.

Significantly, the issue raised in the motion to dimiss was recently met in United States of America v. Conservation Chemical of Illinois, and Norman B. Hjersted, 660 F. Supp. 1236 (N.D. Ind. 1987), hereinafter CCI. Respondent's reliance on Northside is inapposite. In CCI the complaint of EPA injunctive relief was sought under both RCRA and corresponding state statutes. In a lengthy analysis, the court concluded that Northside was not concerned with an enforcement action, but rather with a party's standing and EPA's authority under Section 7006(b), 42 U.S.C. § 6976(b); and that CCI unlike Northside concerned EPA acting pursuant to the enforcement authority under Section 3008, 42 U.S.C. § 6928(a).

Interpreting Section 3008, the court in CCI concluded that:

> These statutory provisions could not be more clear. Even after a state received authorization to implement its own statutory scheme on hazardous waste 'in lieu of the federal program', Congress intended for the EPA to retain independent enforcement authority in those states. . . . all that is required of the EPA is that it first must notify the state of its intent. (at 1244.)

A system of dual enforcement is envisioned under RCRA. This means that even where a state has final authorization, EPA has the option of instituting enforcement proceedings under either federal or state law. Respondent has failed to bring to the attention of the ALJ any final agency decision, or judicial determination, which holds otherwise. Absent such authority, respondent's arguments are unconvincing.

Further, other recent decisions have concluded that a state hazardous waste program authorized under Section 3006 is a RCRA Subtitle C program and that the reference to this "subtitle" in Section 3008 of RCRA includes such state programs.* The Administrator of EPA in effect is authorized to enforce as federal law state hazardous wastes programs and to assess a penalty for the violation thereof.

---

*In the Matter of SCA Chemical Services, Inc., Docket No. V-W-87-R-056 (Order Denying Motion to Dismiss, November 19, 1987); In the Matter of Triangle Metallurgical, Inc. and L.C. Metals, Inc., Docket No. RCRA-V-W-87-R-009 (Opinion and Order Denying Motion to Dismiss, December 9, 1987).

Respondent's claim that this action is barred by Executive Order 12612 (Order) of October 26, 1987, 52 Fed. Reg. 41685 (Oct. 30, 1987) is without merit. Section 8 of the Order expressly provides that the Order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies . . . ." As noted by complainant, the Order by its own terms fails to confer upon respondent the defense it raises in the motion. In addition, the purpose of the Order is not to frustrate Congressional intent or authority. In the preamble and Sections 1 and 2, the Order refers to "Executive departments and agencies" in the "formulation and implementation of policies" (emphasis supplied) and to the policies' related regulations, legislative comments, proposed legislation, and other policy statements or actions. There is nothing in the Order that would preclude EPA from exercising its independent enforcement authority under Section 3008(a) of RCRA.

Respondent also claims that this action violates complainant's own policy of encouraging internal environmental auditing, reporting, and remedial activity. It is contended that this policy is confirmed by EPA's Environmental Auditing Policy Statement (Policy), 51 Fed. Reg. 25004 (July 9, 1986). Complainant contends that this action is consistent with the Policy

because the violations charged in the complaint are indicative of the ineffectiveness of respondent's auditing program. An examination of the Policy reveals the following:

> However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements. (at 25004.)

Respondent's claim is clearly inconsistent with the principles and spirit embodied in the Policy.

For the above reasons, respondent's motion is DENIED. Further order to follow.

Frank W. Vanderheyden
Administrative Law Judge

Dated: April 8, 1988

IN THE MATTER OF KIMBERLY-CLARK CORPORATION, Respondent,
Docket No. RCRA-88-04-R

Certificate of Service

I certify that the foregoing Order dated April 8, 1988 was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Marsha P. Dryden
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, GA 303065

Copy by Regular Mail to:

Attorney for Complainant:

Judith A. Moverman, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, GA 303065

Attorneys for Respondent:

V. Robert Denham, Jr., Esquire
James D. Levine, Esquire
Powell, Goldstein, Frazer & Murphy
1100 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, GA 30335

Doris M. Thompson
Secretary

Dated: April 8, 1988